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# **Bending the Constitution: The new Regulation of Intergovernmental Fiscal Relations in Germany**

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## Introduction

On June 1 and 2, 2017, the German federal parliament adopted a set of new regulations, scheduled to take effect in 2020, reforming the intergovernmental fiscal relationship between the federation and the 16 federal states — called *Länder* — in Germany. These new regulations initiate sweeping change to the federal structure of the constitution.<sup>1</sup> On July 13 and August 17, 2017, the new laws were published in the federal law gazette,<sup>2</sup> despite concerns expressed by Federal President Frank Steinmeier in a letter to the Federal Chancellor Angela Merkel.<sup>3</sup>

At the heart of this reform is a profound change in the fiscal constitution, from its traditional horizontal arrangement among the *Länder* towards a vertical one. The history of German federalism, since 1949, has been characterized as a “unitary federal state,” which is how it was originally described in 1962 by Konrad Hesse.<sup>4</sup> Over time, the *Länder* have often been willing to hand over legislative powers to the federal government, normally in exchange for the right to share decision-making via the *Bundesrat*. That willingness came from the fact that the *Bundesrat* is the German version of a senate – it is where of the representatives of the governments of each of the *Länder* sit. As a result, the *Länder* became more and more financially dependent on the federal government.<sup>5</sup> Originally the federal government co-financed tasks of the *Länder*. This was often referred to as financing in an alien budget, outside the scope of the constitution. In 1969 this system of vertical payments was constitutionalized. Since the 1970s, the system of horizontal fiscal equalization among the *Länder* was supplemented by growing federal grants, and since German reunification in 1990, the payments of the federal governments increased heavily.<sup>6</sup>

Because of this creeping centralization, the strong *Länder* — Baden-Württemberg, Bavaria, Hesse, and North Rhine-Westphalia — pushed for a change. During German reunification in 1990 politicians seized as the opportunity to ask the federal legislature for a constitutional change in favour of the *Länder*.<sup>7</sup> The reform of 1994<sup>8</sup> did not finalize the debate. Two related reforms have followed in 2006<sup>9</sup>

<sup>1</sup> Deutscher Bundestag, Stenographischer Bericht, 237. Sitzung, 1. June 1, 2017, S. 23974-24035; Bundesrat, Stenografischer Bericht, 958. Sitzung, 2. June 2, 2017, pp. 261-280 Alan Fenna was so kind as to help with the intricacies of the English language. Thanks to Alan.

<sup>2</sup> Gesetz zur Änderung des Grundgesetzes, v. 13.07.2017, BGBl. I, 2347; G v 14.08.2017, BGBl. I 2017 p. 3122.

<sup>3</sup> *Frankfurter Allgemeine Zeitung*, August 17, 2018, Steinmeier: “Erhebliche Zweifel” see also:

<http://www.bundespraesident.de/SharedDocs/Pressemitteilungen/DE/2017/08/170814-Neuordnung-Bund-Laender-Finanzbeziehungen.html>.

<sup>4</sup> Konrad Hesse, *Der unitarische Bundesstaat*, (Karlsruhe: C.F. Müller, 1962).

<sup>5</sup> The first “sin” of this kind was that the federal government paid for the heavy equipment of the police as early as 1951/52.

<sup>6</sup> See also: Wolfgang Renzsch, *Finanzverfassung und Finanzausgleich. Die Auseinandersetzungen um ihre politische Gestaltung in der Bundesrepublik Deutschland zwischen Währungsreform und deutscher Vereinigung (1948-1990)*, (Bonn: J.H.W. Dietz Nachf., 1991).

<sup>7</sup> BGBl. II, S. 889, reprinted in: *Die Verträge zur Einbeit Deutschlands*, (München: Beck Texte dtv, 1990), p. 43ff.

<sup>8</sup> BGBl. I S. 3146. Extensively documented in: 12. Deutscher Bundestag (publisher), *Materialien zur Verfassungsdiskussion und zur Grundgesetzänderung in der Folge der deutschen Einigung* (See 2/96), 3 volumes, Bonn 1996.

<sup>9</sup> See: Christian Maiwald (ed.), *Grundgesetz. Text. Föderalismusreform mit Begleitgesetz und Einführung*, Heidelberg, München 2006; Winfried Kluth (ed.), *Föderalismusreformgesetz. Einführung und Kommentierung*, Baden-Baden 2007; Deutscher Bundestag/Bundesrat (publisher), *Dokumentation der Kommission von Bundestag und Bundesrat zur Modernisierung bundesstaatlichen Ordnung* (Zur Sache 1/2005), Bonn 2005; Rainer Holtschneider/ Walter Schön (ed.), *Die Reform des Bundesstaates. Beiträge zur Arbeit der Kommission zur Modernisierung der bundesstaatlichen Ordnung 2003/2004 und bis zum Abschluss des Gesetzgebungsverfahrens 2006*, Nomos: Baden-Baden 2007.

and 2009.<sup>10</sup> The objective of the 2006 reform was to disentangle the tasks of the federation and the *Länder*, and thereby strengthen the autonomy and responsibility of both levels of government. The second reform strived for a modernization of the intergovernmental fiscal relations. The most important result was the debt brake, which restricts the federal government from borrowing more than 0.35 percent of the GDP annually and forbids any borrowing by the *Länder* constitutionally from 2020 onwards. Also, an agreement was struck between the federation and the *Länder* about EU sanctions. The key subjects of intergovernmental fiscal relations reform and fiscal equalization among the *Länder* were left blank.

### ***The third attempt to modernize the intergovernmental fiscal relations***

The fiscal equalization law of 2001<sup>11</sup> will expire on December 31, 2019. Also, Bavaria and Hesse challenged the constitutionality of the current law at the Federal Constitutional Court.<sup>12</sup> In response to these two events, the Social Democratic Party (SPD) and Christian Democratic Union (CDU) agreed in their coalition agreement of 2013<sup>13</sup> to call a federation–*Länder*-commission, “to discuss questions of the intergovernmental relations and provide proposals for a modernization.” The commission was to present its results within two years.

In the end, the report was not completed. This failure can be attributed to various factors, for example the heterogeneous interests of the *Länder*, as well as the tensions created by the legal action of Bavaria and Hesse. Due to these tensions, even procedural questions became fraught. Although discussions were conducted among the *Minister-Presidents* (premiers) of the *Länder*, and their ministers of finance provided a report in October 2014, there was no common position among the government elite, just disagreement.<sup>14</sup>

More than a year later, on December 3, 2015, the premiers announced an agreement.<sup>15</sup> Since it was primarily an agreement at the expense of a third party, this proposal was rejected immediately by the Federal Minister of Finance, Wolfgang Schäuble. He was supported by the majority parties in parliament.<sup>16</sup> In April 2016, preliminary steps towards a rapprochement between the two levels of government were taken. The federal minister of finance agreed to increase the federation’s contribution, in exchange for financial concessions from the *Länder*.<sup>17</sup> The conflict that had originally been one

<sup>10</sup> Documents in: Deutscher Bundestag/Bundesrat (publisher), *Die gemeinsame Kommission von Bundestag und Bundesrat zur Modernisierung der Bund-Länder-Finanzbeziehungen. Die Beratungen und ihre Ergebnisse*, Berlin 2010.

<sup>11</sup> Gesetz von 20.12.2001 BGBl. I S. 3955, 3956, zuletzt geändert durch Art. 2 Gesetz v 14. 08. 2017 BGBl. I S. 3122.

<sup>12</sup> 2 BvF 1/13.

<sup>13</sup> Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD, [www.bundesregierung.de/Content/DE/\\_Anlagen/2013/2013-12-17-koalitionsvertrag.html](http://www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.html)

<sup>14</sup> See documents in: *Jahrbuch für öffentliche Finanzen 1-2016: Verhandlungen zum Finanzausgleich*, Martin Junkernheinrich, Stefan Koriath, Thomas Lenk, Henrik Scheller, Matthias Woisin, eds. Berliner Wissenschafts-Verlag: Berlin, 2016. For the early development see Rolf Börsinger (pp. 11-18) as well as Karin Klingens and Wolfgang Renzsch (pp. 147-156).

<sup>15</sup> Published in *Jahrbuch für öffentliche Finanzen 1-2016, Anhang 18*, pp. 325-327.

<sup>16</sup> See *Frankfurter Allgemeine Zeitung* February 23, 2016: Ralph Brinkhaus/Carsten Schneider, “Vom brüderlichen zum väterlichen Finanzausgleich.”

<sup>17</sup> I, April 22., 2016: “Zäher Kampf um die Milliarden für Flüchtlinge,” *Frankfurter Allgemeine Zeitung*, April 22., 2016; “Im Bund-Länder-Streit ums Geld deutet sich eine Lösung an,” *Süddeutsche Zeitung*, April 23., 2016; “6 gegen die schwarze Null.”

among the *Länder* became one between the federation and the *Länder*. This also meant that a solution within the current period of legislation seemed impossible due to general federal disagreement and budget conflicts.<sup>18</sup> In the parliamentary budget debate of September 7, 2016, Chancellor Angela Merkel indicated the possibility of a turnaround. She said, “the citizens of Germany are not interested in issues of government jurisdiction, they simply want a *one-stop-access* to public administration ....”<sup>19</sup> The meeting of the Chancellor with the premiers on 4 October 2016<sup>20</sup> showed some progress. On 14 October the meeting of the “Heads of the Governments of the Federation and the *Länder*” – an informal but extremely influential gathering of the political elites – agreed on cornerstones of a new regulation and in mid-November the administration provided the first legislative proposals.

The federal government then made two submissions to the *Bundesrat*. The government submitted its draft of constitutional amendments on December 15 and its draft of the Fiscal Equalization Law and others on December 30, 2016.<sup>21</sup> On February 23, 2017, the government then submitted the drafts of both bills to the *Bundestag*.<sup>22</sup> While the *Länder* were hoping for a quick legislative process to approve these amendments, the *Bundestag*'s budget committee opted to hold public hearings in March 2017.<sup>23</sup> Final deliberations for the constitutional amendments and policies took place on June 1 and 2, 2017.

### *The new regulations in force from 2020 onwards*

With 13 constitutional amendments and 25 further legal changes, this reform is one of the larger changes to the federal system since the establishment of the Federal Republic of Germany in 1949. The reform was supported by a large majority of the two coalition partners. The Greens agreed with some provisions to a limited number of clauses, but not with all. The Left-Party rejected the amendments and legal changes completely. In the *Bundesrat*, all *Länder*, from CSU-governed Bavaria to Left-Party-led Thuringian government, agreed. In the public discussion of the amendments, criticism was restricted to a few politicians. The President of the *Bundestag*, Norbert Lammert, believed the reform to be a dangerous slide towards centralization and thus rejected it.<sup>24</sup> In opposition to her Minister-President, Thuringia's Minister of Finance, Heike Taubert, criticized the reform. She argued that the “vital demand — sufficient financial resources for all *Länder* to fulfil their tasks — had been neglected” and “therefore it is not conceivable how all the have-not *Länder* could accept this compromise.”<sup>25</sup>

<sup>18</sup> *Frankfurter Allgemeine Zeitung*, June 12, 2016: “Ausgleich wird nichts mehr.”

*Die Welt*, September 30, 2016: “16 Länderchefs kontra Schäuble.”

<sup>19</sup> Deutscher Bundestag, Plenarprotokoll, 18. WP., 186. Sitzung, September 7, 2016, p. 18417 “(D): denn der Bürger in Deutschland interessiert sich nicht dafür, welche Ebene gerade zuständig ist, sondern er will *einen* Zugang für sich haben.”

<sup>20</sup> *Süddeutsche Zeitung*, October 6, 2016: “Schäubles Angebot”; *Die Welt*, October 6, 2016: “Mehr Geld, mehr Macht”

<sup>21</sup> BRat-Drs. 769/16 und 814/16.

<sup>22</sup> BT-Drs. 18/11131 und 18/1135.

<sup>23</sup> Deutscher Bundestag, Haushaltsausschuss/ *Protokolle* Nr. 94, 95, 97, 98, 99, 101, 102, under <https://www.bundestag.de/ausschuesse18/a08/anhoerungen/-/278496>. Especially Nr. 98.

<sup>24</sup> *Handelsblatt*, May 19, 2017: “Lammert lehnt Finanzreform ab”; I, May 19, 2017; *Frankfurter Allgemeine Zeitung*, “Lammerts Kampfansage;” *faz.net*, June 1, 2017: “Lammert attackiert Bund-Länder-Finanzreform.”

<sup>25</sup> Taubert, Heike, Thater, Christian, Rohloff, Vera, “Ein mathematisches Glanzstück, aber kein föderales Meisterwerk,” in: Martin Junkernheinrich, Stefan Koriath, Thomas Lenk, Henrik Scheller & Matthias Woisin (eds.), *Jahrbuch für öffentliche Finanzen 1-2016* (pp. 63-76) (Berlin: Berliner Wissenschafts-Verlag, 2016); p. 74f.

Critical responses also came from the academic experts and the national quality press. One of the main issues was the abolition of the central element of the traditional fiscal equalization system, the “horizontal” equalization among the *Länder* themselves (Art. 107 para 2 Basic Law), in which the “have” *Länder* provide payments to the “have-not” *Länder*. This system has been controversial in the past because the richer *Länder* had to pay from their own budgets and felt overburdened while the have-not *Länder* always considered the money they got insufficient. This is considered to be the nucleus of the “fraternal” system in which the *Länder* — at least in theory — regulated these matters on their own without the interference of the federal government. This fraternal system forced the *Länder* to make compromises necessary for a universally accepted outcome. The federal “stepping in for one another” — federal comity— was a central element of the autonomy of the *Länder* as well as of the solidarity among them. From 2020 onwards, it will be replaced by vertical payment out of the revenues of the sales tax. Depending on its fiscal capacity, each *Land* will get extra payments or reductions.

One advantage will be that the rich *Länder* will no longer provide payments from their own budgets to smaller have-not *Länder*. Equalization will be implemented as part of the normal course of revenue sharing between the federation and the *Länder*. This should make the system seem less controversial. Equalization will no longer be a matter of the *Länder* themselves but will become a matter of the federal government; fraternal equalization will become paternal equalization.

It is uncertain whether this will end disputes about equalization. While there will no longer be contributions from individual *Länder* budgets it seems quite possible that old quarrels about horizontal payments will re-emerge in the form of disputes about vertical payments. The issues in dispute were specifically related to the surcharges and extra payments, in particular because the quota for both (63 percent) is a political figure based on a compromise among the *Länder*, without any rational justification. For these reasons, the compromise may be considered unstable and could lead to a complete conversion to a vertical equalization system.<sup>26</sup>

### ***Further new regulations of federal fiscal relations***

In addition to this operation within the nucleus of the German federal system, there are several new regulations strengthening the federation vis-à-vis the *Länder* and thereby reducing the federal nature of the *Bundesrepublik*.

Further constitutional regulations are being discussed, regulations that give the federal government a stronger say in programs that are established by the *Länder* and co-financed by the federal government. Historically the *Länder* always rejected such interference.

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<sup>26</sup> Stefan Koriöth, “Die finanzverfassungsrechtliche Problematik des Beschlusses der Ministerpräsidentenkonferenz vom 3. Dezember 2015 – eine erste Einschätzung,” in: Martin Junkernheinrich, Stefan Koriöth, Thomas Lenk, Henrik Scheller & Matthias Woisin (ed.), *Jahrbuch für öffentliche Finanzen 1-2016* (pp. 121-130), (Berlin: Berliner Wissenschafts-Verlag; 2016); p. 125.

The constitutional principle that local government is a matter solely under *Länder* jurisdiction has been violated by the reform. Art. 104c of the Basic Law stipulates that the federal government may pay the *Länder* “financial assistance for investments in the local educational infrastructure of financially weak local governments (counties) if this is of importance for the federation as a whole.” “Local education infrastructure” refers primarily to schools. *Länder*, independent of their fiscal capacity, will get federal money. This new regulation ignores the responsibility of *Länder* for their “poor” local governments. It is beyond any doubt that schools are important for the federation as a whole; however, it becomes difficult when it comes to the question of the modernization of a single school. The law regulating the assistance<sup>27</sup> in detail does not explain the criteria for monetary assistance to each *Länder*. Fiscal capacity appears not to be an important criterion. Instead, the distribution of federal money to the *Länder* simply follows a slightly modified per capita rate.

After the federal elections of 2017 the new federal government intended to change this regulation again. The government intended to omit the words “financially weak” in order that all local governments can receive federal money for the “education infrastructure.”<sup>28</sup> The *Minister-President* of Baden-Württemberg, Winfried Kretschmann, was the first to oppose this proposal and referred to it as “sweet poison” because it would give the federal government more powers to interfere in the matters of the *Länder*.<sup>29</sup> He was soon supported by the Minister-Presidents of Saxony and North Rhine-Westphalia, later also by the Minister-Presidents of Bavaria and Hesse. By the end of 2018 both rich and poor *Länder* vetoed the proposal. The poor *Länder* rejected a new proposal of the budget committee of the *Bundestag* which would have limited the federal financial assistance to 50 percent of the expenditure.<sup>30</sup> The poor *Länder*, which were ready to accept a federal say in these matters in exchange for financial support, disagreed with the last amendment. In the end the rich *Länder* rejected the proposal because they feared for their autonomy in education. The poor *Länder* rejected it for a different reason: they disagreed with the limitation of the federal contribution to 50 percent of the overall expenditure.<sup>31</sup> Currently, the intermediation committee of both federal legislative chambers has started to negotiate a compromise.

One of the more controversial aspects of these financial reforms is the regulation under Art. 107 para 2, which states that the mining royalties on crude oil, royalties that generate insignificant revenues in all but two *Länder*, will be considered only partially part of the *Länder's* fiscal capacity.<sup>32</sup> This question needed to be regulated in the Constitution as the Federal Constitutional Court ruled in 1986 that all relevant revenues of the *Länder*, including the mining royalties on crude oil (“oil tax”), must be calculated wholly as part of each individual *Land's* fiscal capacity.

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<sup>27</sup> Art. 7 Gesetz von 14.08.2017, BGBl. I 3122, 3127f.

<sup>28</sup> Bundesrats-Drucksache 165/18.

<sup>29</sup> Bundesrat, Protocol 969. Sitzung, 6 July 2018, p.195f.

<sup>30</sup> Bundestags-Drucksache 19/6144.

<sup>31</sup> Albert Funk, “Machtkampf ums Grundgesetz,” *Tagespiegel*, December 6 2018; *Süddeutsche Zeitung*, December 6 2018: “Digitalpakt – 16 Länder gegen Grundgesetzänderung.”

<sup>32</sup> Art. 107 (new) para 2, 4<sup>th</sup> sentence *Grundgesetz* (Basic Law).

A new article, 143d of the Basic Law, provides for financial assistance to stabilize the budgets of the two smallest *Länder*, Bremen and the Saarland.<sup>33</sup> Accordingly, the federal government will pay 400 million Euros to each of the two *Länder* annually, which will allow them to honour the debt brake. These payments have been agreed to for an indefinite period and may indicate that federal legislators lack confidence in the ability for Bremen and Saarland to survive without government intervention and assistance.<sup>34</sup>

The new fiscal equalization law<sup>35</sup> provides four further amendments:

- The ratio of sales tax sharing will be decided based according to percentage points and fixed sums: The federation get 52.80864227 percent, the *Länder* 45.19541378 percent, and the local governments 1.99594395 percent of the revenue (older regulations worked with one digit after the decimal point). Additionally, the *Länder* get fixed lump sums of 6.738 billion Euros (from 2021 onwards increasing to 6.871 Billion Euros) which the federation pays to the *Länder* and local governments.
- Brandenburg will get an extra 11 million Euros annually in federal supplementary grants for the expenditure for political leadership in small *Länder*. It is uncertain whether this regulation will be accepted by the Federal Constitutional Court.
- 75 percent of the local fiscal capacity will be added to the fiscal capacity of the *Länder*. (The old regulation demanded 64 percent.) That means that 25 percent of the local fiscal capacity remains neglected when calculating fiscal capacity. In order to compensate for that gap, the *Länder* with financially weak local governments will receive additional federal grants of between 53.5 percent of the gap and 80 percent of the average *Land*'s total grants. Economists do not understand the value behind this regulation as the combination of both rules will not result in an increase of local revenues but losses after equalization.<sup>36</sup>
- Another rule states that *Länder* that receive less than 95 percent of federal research assistance will get 35 percent of the gap to 95 percent of the average. This may put a premium on *Länder* with insufficient research policy. Equalization payments will be paid not only if a *Land* is fiscally weak but also when it is not successful in applying for federal research grants. The rationality of such a rule is hardly explicable.

What do these new regulations mean financially for the *Länder*? It depends how it is calculated.

According to the official calculation of the federal Ministry of Finance, the system of equalization will be terminated by December 31, 2019, thus ending all grants distributed by the federal government. In

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<sup>33</sup> See Art. 5 Gesetz von 14.08.2017, BGBl. I 3122, 3126f.

<sup>34</sup> See also Wolfgang Renzsch, "Die Sanierungshilfen in der neuen Finanzausgleichregelung ab 2020," in *Jahrbuch des Föderalismus*, Bd. 18, 2017.

<sup>35</sup> Art. 2 Gesetz von 14.08.2017, BGBl. I 3122, 3123ff.

<sup>36</sup> Thomas Lenk, Philipp Glinka, "Der neue bundesstaatliche Finanzausgleich – eine Reform und viel Reformaufschub," in *Wirtschaftsdienst* 97, 2017, pp. 506-512.

total, 9.5 billion Euros or 116 Euros *per capita* would be transferred from the federation to the *Länder*. The distribution among the *Länder* would be unequal: The two smallest *Länder* receiving special budget assistance would get higher amounts: 732 Euros per capita for Bremen and 493 Euros per capita for Saarland. The East German *Länder* and Berlin would get between 229 and 114 Euros, the West German *Länder* between 106 and 76 Euros.

This calculation is controversial because it is based on the assumption that in 2020 all grants and federal transfer payments would end. Politically this is unlikely because such a termination would not be accepted, in particular because some of these payments are provided for by the constitution. Thus, these grants and federal transfer payments can be changed, but not completely abolished. Furthermore, it would be politically untenable for the federal government to continue collecting a surcharge on the income tax while simultaneously abolishing grants for the *Länder*. Taking into account such realities, the Institute for Public Finance and Public Management of Leipzig University calculated the *actual* budget change from 2019 to 2020.<sup>37</sup> Those calculations suggest that the winners will be Bremen with a gain of 476 Euros *per capita* and Saarland with a gain of 403 Euros per capita. These two would be, followed by the richer West German *Länder* with an additional 267 to 362 Euros *per capita*. The East German *Länder* and Berlin receive the smallest gains with additional 157 to 219 Euros per capita. These figures show not only the changes due to the new equalization law but also the expected increase of tax revenues until 2020.

Independently of how it is calculated, the result remains that the inequality between the have and have-not *Länder* will increase and not diminish. The adjustment of the living conditions in East and West Germany will become more complicated and the disparities within the Federal Republic will increase.

### ***Further changes within the system of intergovernmental relations***

Even outside of the fiscal intergovernmental relations the federal government could extend its powers at the expense of the *Länder*. Hitherto the *Länder* have been responsible for federal motorways and long-distance roads on “federal commission” (Art. 85 of the Basic Law) meaning that the federal government is (with the consent of the *Länder*) in charge of planning and financing motorways and long-distance roads but the actual implementation (road construction and maintenance) is done by the *Länder* administrations. Under the new regime, responsibility for the national road system will become part of the federal administration and the federal government will create a private company which the federal government will employ for this service. The advantage for the federal government lies in the fact that such a company is not bound by the regulations for public budgets and provisions for public orders. In particular, by being “off budget,” this major spending area is not subjected to the debt brake, which can thus be circumvented. Not only will tasks of the *Länder* be transferred to the federal government but this policy has also created a significant budgetary loophole.

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<sup>37</sup> Lenk, Glinka, *Wirtschaftsdienst* 97, 2017, p. 509f.

Furthermore, the control of the budgetary policy of the *Länder* by the federal government will be increased as a result of the rule that the Federal Audit Authority may control “outside the federal administration.” Even though this rule is restricted primarily to federal funds given to the *Länder* to fulfil their constitutional tasks, it implies another shift of the federal balance at the expense of the *Länder*.

An article of the constitution that could possibly be ruled unconstitutional will be introduced by the new Article 143f of the Basic Law. This article allows the federal government or three *Länder* governments to terminate the fiscal regulations from December 31, 2030 onwards. They can request new negotiations and, if there are no results within five years, the laws will expire. This implies two different issues: First, Art. 20 para 2 of the Basic Law<sup>38</sup> will be violated. It determines that laws can be changed by the legislature only. In this case a law would be terminated by the public administration. Whether or not this would violate Art. 79 para 3 of the Basic Law – the so-called eternity guaranty – would be a question for the Federal Constitutional Court. Second, within a termination of the law regulating the intergovernmental fiscal relations, Art. 107 para 2 of the Basic Law would be violated. This article demands an “adequate” fiscal equalization.

### ***To summarize***

In Germany, reforms of the intergovernmental fiscal relations were always difficult, however, changed legislation was always a result of high political expertise. The administrative preparations, and the negotiations demanded a lot of time. They were conducted by experts from both the administration and academia, often in public discourse. This legislation was based on a political agreement by the premiers of the *Länder*, forged behind closed doors, for which the federal government was supposed to pay. In the end the federal governments accepted this agreement in exchange for more federal powers, which shifts the federal balance in favour of the federation. This agreement was not developed within the usual procedures of parliamentary and public debates but – although all formal constitutional requirements were observed – in a private meeting of the top elites of *Länder* politicians.

In the end a proposal was provided which – according to the *Länder* Minister-Presidents – could not be altered. Due to the legislation adopted it is possible that the disparities among the *Länder* will grow and the federal balance will be changed in favour of the federation. This not because of federal pressure, but due to the willingness of the *Länder* to sacrifice power for money. Vital questions like how to deal with demographic challenges or the not convincing primary distribution of tax revenues were not dealt with. Due to the issues outlined above, it is conceivable that the Federal Constitutional Courts will have to deal with this legislation soon after it comes into force.

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<sup>38</sup> All public powers derive from the people. They will be executed by the people in elections and referenda and by special organs of legislation, execution and judication.

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